Supreme Court, U.S.
FILED
FEB 22 1999
CLERK

No. 98-1173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF ATLANTA, *et al.*,

Petitioners,

vs.

R. MAYER OF ATLANTA, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

THOMAS E. MADDOX, JR.
Counsel of Record
THOMAS E. MADDOX, JR., P.C.
Attorneys for Respondents
3521 Habersham-at-Northlake
Tucker, Georgia 30084-4009
(770) 414-8055

151337

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent R. Mayer of Atlanta Inc. has no parent company and no nonwholly owned subsidiaries.

TABLE OF CONTENTS

Page

Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Cited Authorities iv

Statement of the Case 1

Reasons for Denying the Writ 4

I. The Court Of Appeals Correctly Construed 49 U.S.C.A. § 14501 To Preempt Local Regulation Of The Towing Industry, Except As To The Price Of Non-consensual Tows. 4

A. The Challenged Provisions Of The Ordinance Relate To The Route And/Or Service Provided By A Motor Carrier. ... 5

B. The Federal Aviation Authority Authorization Act Of 1994. 5

C. ICC Termination Act Of 1995 Applies To (Preempts) Consensual Towing And Exempts (From Preemption) Non Consensual Towing. 6

D. The Challenged Provisions Of The Ordinance Are Preempted By These Statutes. 7

Contents

Page

E. The Intent Of Congress To Expressly Preempt Those Provisions Of The Wrecker Ordinance Which Relate To The "Route" Or "Service" Of Wrecker Services, Is Supported By Extrinsic Aides To Construction. 9

II. The Present Case Is Not The Appropriate Vehicle To Determine The Effect Of 49 U.S.C.A. § 13506(b). 10

Conclusion 12

TABLE OF CITED AUTHORITIES

Page

Cases:

Cardinal Towing & Auto Repair, Inc. et al. v. The City of Bedford, Texas, et al. United States Court of Appeals for the Fifth Circuit *Case no.* 98-10194 ..... 11, 12

Cippolone v. Liggett Group, Inc., 505 U.S. 504, 112 S. Ct. 2608 (1992) 4

In re Chateaugay Corp., 154 B.R. 29 (Bkrtcy. S.D.N.Y. 1993) 8

In re Gerwer, 898 F.2d 730 (9th Cir. 1990) 8

In re Orlinski, 140 B.R. 600 (Bkrtcy. S.D. Ga. 1991) . 8

League of United Latin American Citizens Council No. 4434 v. Clements, 914 F.2d 620 (5th Cir. 1990) ... 9

Lewis v. Brunswick, Corp., 107 F.3d 1494 (11th Cir.), *cert. dismissed*, __U.S. __, 118 S. Ct. 1793 (1998) 5

McNary v. Haitian Refugee Center, Inc., 111 S. Ct. 888 (1991) 8

Resolution Trust Corporation v. Westgate Partners, Ltd. 937 F.2d 526 (10th Cir. 1991) 8

United States v. Evinger, 919 F.2d 381 (5th Cir. 1990) 9

Cited Authorities

	Page
United States v. Goldbaum, 879 F.2d 811 (10th Cir. 1989)	8
United States v. Newman, 982 F.2d 665 (1st Cir. 1992)	8
Wisconsin Pub. Intervernor v. Mortier, 501 U.S. 597, 11 S. Ct. 2476 (1991)	4
Statutes:	
49 U.S.C. § 0102(13)	6
49 U.S.C. § 0102(14)	6
49 U.S.C.A. § 13506(b)	10, 11
49 U.S.C.A. § 14501	4
49 U.S.C. § 14501(c)	5, 8
49 U.S.C. § 14501(c)(1)	7
49 U.S.C. § 14501(c)(2)(B)	7
49 U.S.C. § 14501(c)(2)(C)	6, 9, 10, 11
Atlanta, Ga., Code § 14-9003	3
O.C.G.A. § 44-1-13	3

Cited Authorities

Page

United States Constitution:

Supremacy Clause of Article IV 1, 4

Other Authorities:

1994 *U.S. Cong. & Ad. News*, p. 1757 6

H. Rept. 104-311, 1995 *U.S. Cong. & Ad. News*, p. 831 9

STATEMENT OF THE CASE

The Petitioners correctly contend that the action brought in the District Court was that the City of Atlanta Wrecker Ordinance, to the extent it applies to towing firms engaged in consensual towing and located outside the corporate limits of the City of Atlanta, is in violation of the Supremacy Clause of the Constitution of the United States of America.

The towing industry practices which were the subject of the action in the District court are correctly characterized as **CONSENSUAL PRIVATE TOWING**- a private agreement between the owner of a vehicle and a towing company for the transport of the vehicle by means of a tow truck (either hooked to or loaded onto the tow truck). This case concerns the transportation of vehicles across local government and state boundaries in non-emergency situations.

Consensual towing may occur in one of four ways relevant to this appeal:

a) A vehicle owner may contract with a towing company to have the towing company pick up a vehicle from a location within the city limits and deliver the vehicle to a location within the city limits.

b) A vehicle owner may contract with a towing company to have the towing company pick up a vehicle from a location within the city limits and deliver the vehicle to a location outside the city limits.

c) A vehicle owner may contract with a towing company to have the towing company pick up a

vehicle from a location outside the city limits and deliver the vehicle to a location within the city limits.

d) A vehicle owner may contract with a towing company to have the towing company pick up a vehicle from a location outside the city limits and deliver the vehicle to a location outside the city limits where the most reasonable rout between pickup and delivery would take the tow truck into the city limits through the city.

This action has not addressed NON CONSENSUAL PRIVATE TRESPASS TOWING- the removal of a vehicle which has been found illegally parked (trespassing) on another's private property. The agreement is between the owner of the property and towing company. The owner of the illegally parked vehicle has not consented to the removal of his vehicle.

This action filed in the District Court did not concern GOVERNMENT CONTRACT OR ROTATION LIST TOWING (Emergency towing)- a private vehicle is disabled or is seized by law enforcement; the law enforcement authority has a contract with a towing company or system by which a towing company is called to remove the vehicle; the owner of the vehicle is unable to choose a towing company or is not allowed to choose; the agreement (contract) is between the government and the towing company; the vehicle owner has not consented to the use of the towing company to remove his vehicle.

None of the Respondents are engaged in "private trespass towing" and none of the citations written against them involve such towing. All of the Respondents are engaged in consensual towing and in every instance from which this case arises the

owner of the vehicle in tow had contracted with the towing company for services.

However, Section 14-9003 of the Code for the City of Atlanta [Atlanta, Ga., Code § 14-9003, "The Ordinance"] (Appellants Exhibit 2) is entitled

> AN ORDINANCE IMPLEMENTING OFFICIAL CODE OF GEORGIA ANNOTATED (O.C.G.A. § 44-1-13) FOR THE PURPOSE OF PROVIDING FOR **PRIVATE PROPERTY TRESPASS TOWING**, ESTABLISHING LICENSING PROCEDURES AND RATES FOR TOWING AND STORAGE FIRMS; AND FOR OTHER PURPOSES.

Most of the provisions of the ordinance in fact concern PRIVATE TRESPASS TOWING and regulations of private trespass towing authorized by O.C.G.A. § 44-1-13. Only *one sentence* in subsection (c) makes it unlawful for ***any person*** to operate a tow truck (wrecker) ***upon any of the streets*** within the City of Atlanta unless in possession of two permits, one for the particular driver and one for the particular wrecker used. According to the testimony of the officers and according to the facts and circumstances of each of the arrests reported by way of affidavit, "operating a wrecker" means either: (1) delivering a vehicle to a location within the City of Atlanta; (2) removing a vehicle from any location within the City of Atlanta; or (3) simply driving a wrecker whether loaded or not on any street or highway within the City of Atlanta.

By omission the Petitioners have misrepresented in the proceedings below the fact that a claim of Federal Pre-emption was plead in the Complaint as originally filed. In paragraph 41 of the Appellants' Complaint (Appendix p. 35) the Appellants alleged as follows:

41.

The local regulation of interstate tow truck operators by the City of Atlanta is preempted by the United States Constitution, the Interstate Commerce Commission, the Federal Motor Carriers Safety Regulations, and other related federal statutes and regulations pertaining to interstate motor carriers.

The attempt to amend the complaint was an attempt only to add the specific citation to the complaint. The District Court's refusal to allow the specific citation did not affect whether or not federal preemption was an issue in the case.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY CONSTRUED 49 U.S.C.A. § 14501 TO PREEMPT LOCAL REGULATION OF THE TOWING INDUSTRY, EXCEPT AS TO THE PRICE OF NON-CONSENSUAL TOWS.

Where a state law is in direct conflict with federal law, the state law, under the Supremacy Clause of Article IV of the United States Constitution is preempted and thereby rendered unenforceable, i.e., "without effect," *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608 (1992). A municipal ordinance is analyzed as if it were a state statute for Supremacy Clause purposes, *Wisconsin Pub. Intervernor v. Mortier*, 501 U.S. 597, 11 S. Ct. 2476 (1991).

Preemption of statutes (or ordinances) based on historic police powers or state delegation of authority are superseded

by federal law when Congressional intent is clear and manifest, *Lewis v. Brunswick, Corp.*, 107 F.3d 1494 (11th Cir.), *cert. dismissed*, __U.S. __, 118 S. Ct. 1793 (1998). State law is displaced by federal law where: (1) Congress expressly preempts state law; (2) Congressional intent to preempt is inferred from the existence of a pervasive regulatory scheme; or (3) "conflict preemption" where state law conflicts with federal law or interferes with the achievement of federal objectives. *Lewis*, *supra* at 1500.

The Petitioners concede that the Atlanta Ordinance and these federal statutes should be construed based on principles of "express Preemption" and decline to argue for any "implied Preemption" (Petition page 10).

A. The Challenged Provisions Of The Ordinance Relate To The Route And/Or Service Provided By A Motor Carrier.

The Atlanta Wrecker Ordinance is a "law" or "regulation" relating to the route and/or service of motor carriers (wrecker companies) with respect to the transportation of property (motor vehicles). Tow trucks are motor carriers as defined in the following Acts of Congress and any state or local act which prohibits the operation of a tow truck on "any of the streets" of the jurisdiction is a regulation relating to the route or service of motor carrier.

B. The Federal Aviation Authority Authorization Act Of 1994.

49 U.S.C. § 14501(c) which went into effect on January 1, 1995 provides, in pertinent part, as follows:

> *[A] political subdivision of a State . . . may not . . . enforce a law, regulation, or other provision having*

> *the force and effect of law related to price, route or service of any motor carrier . . . with respect to the transportation of property. 49 U.S.C. § 14501(c)(1)*

A "motor carrier" is defined at 49 U.S.C. § 0102(13) as "a motor common carrier and a motor contract carrier." Motor common carrier is defined as "a person holding itself out to the general public to provide motor vehicle transportation for compensation over regular or irregular routes, or both." 49 U.S.C. § 0102(14). "The term motor carrier as used in new subsection (h) of section 14501 has a broad connotation." 1994 *U.S. Cong. & Ad. News*, p. 1757. The FAAA Act of 1994 mandated the deregulation of intrastate motor carriers of property and expressly prohibited political subdivisions from enacting or enforcing any law or regulation having the force or effect of law relating to the price, route or service of motor carriers of property.

C. ICC Termination Act Of 1995 Applies To (Preempts) Consensual Towing And Exempts (From Preemption) Non Consensual Towing.

The ICC Termination Act of 1995, Public Law 104-88, December 29, 1995, 109 Stat. 80. became effective on January 1, 1996. In response to political pressure from State and local governments concerned that their legal authority to regulate prices charged for non-consent towing had been preempted by the FAAA Ct of 1994, in the ICC Termination Act of 1995 Congress added a third exemption to the preemption statute, 49 U.S.C. § 14501(c)(2)(C), to wit:

> *(c) MOTOR CARRIERS OF PROPERTY.—*
>
> > *to restore the authority of State and local governments to regulate the price charged for non-consensual towing services*

(1) GENERAL RULE. —

Paragraph (1) —

(A) * * *

(B) * * *

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the vehicle owner or operator of the motor vehicle.

The new exemption added by Congress in late 1995 *restored State and local government regulatory authority only as to the price* charged for non-consent towing service; the regulation of the *routes* and *services* of towing services by State and local governments remains preempted under the general preemption provision, 49 U.S.C. § 14501(c)(1).

D. The Challenged Provisions Of The Ordinance Are Preempted By These Statutes.

In addition to the plain language regarding tow trucks in the Acts it must be argued that if Congress wanted to exempt regulations of tow truck operations from the preemptive effects of the Act, as for example it did with household goods movers in 49 U.S.C. § 14501(c)(2)(B), Congress would have done so. It did not. It is a universal principle in the interpretation of statutes that *expressio unius est exclusio alterius*; the specific mention of one thing implies the exclusion of other things.

Where a statute expressly enumerates a specific exclusion from the operation of the statute, an irrefutable inference must be drawn that the statute should apply to all matters not specifically excluded. *United States v. Newman*, 982 F.2d 665 (1st Cir. 1992). Congress is presumed to legislate with knowledge of the basic rules of statutory construction. *McNary v. Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991). Congress created an express exception from the statute for non-consensual towing price regulation, therefore any other exceptions, e.g. regulation of the "routes" or services" of towing operations, or price controls on *consent* towing, are not to be implied. *In re Gerwer*, 898 F.2d 730 (9th Cir. 1990); *United States v. Goldbaum*, 879 F.2d 811 (10th Cir. 1989). There is a heavy presumption that Congress says what it means and means what it says. *Resolution Trust Corporation v. Westgate Partners, Ltd.* 937 F.2d 526 (10th Cir. 1991); *In re Chateaugay Corp.*, 154 B.R. 29 (Bkrtcy. S.D.N.Y. 1993); *In re Orlinski*, 140 B.R. 600 (Bkrtcy. S.D. Ga. 1991).

After reviewing all of the District Court cases decided since the passage of 49 U.S.C. § 14501(c) the Court of Appeals below held,

> We agree with the reasoning of the Harris County and Ace Auto Body courts in that the express reference to towing services in § 14501(c)(2)(c) provides conclusive evidence that Congress intended to extend the general rule of preemption to those aspects of the towing industry that are not listed within the exception.

E. The Intent Of Congress To Expressly Preempt Those Provisions Of The Wrecker Ordinance Which Relate To The "Route" Or "Service" Of Wrecker Services, Is Supported By Extrinsic Aides To Construction.

When, as in the case *sub judice*, the language of the statute is clear and unambiguous, the court must not look beyond the statute's express terms in determining the legislature's intent. *United States v. Evinger*, 919 F.2d 381 (5th Cir. 1990). There is no need to examine the legislative history. *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990).

However, if there were any doubt about the express intent of Congress those doubts are erased by the legislative history *The ICC Termination Act of 1995*. The legislative history of the ICC Termination Act of 1995 House Report 104-311 reads:

> [49 U.S.C. § 14501(c)(2)(C)] provides a new exemption from the preemption of State regulation of intrastate transportation relating to the price of non-consensual tow truck services. *This is only intended to permit States or political divisions thereof to set maximum prices for non-consensual tows, and is* ***not intended to permit re-regulation of any other aspect of tow truck operations.***

(Emphasis supplied). The Committee had been asked to go farther and permit State and political subdivisions thereof to re-regulate all aspects of non-consensual towing services. The Committee provision struck a balance between the need to protect consumers from exorbitant towing fees and the need for a free market in towing services. H. Rept. 104-311, 1995 *U.S. Cong. & Ad. News*, pp. 831-832.

Congress specifically considered whether or not the authority of State and local governments to regulate *all* aspects of non-consensual towing should be restored, and determined that only the authority with regard to non-consent towing *price* regulation should be restored to state and local governments. Congress specifically rejected the suggestion that matters of "service" and "routes" should be re-regulated.

While the Petitioners may correctly argue that air cargo considerations were the leading motivation for the statutory changes it cannot seriously be argued that the matter of towing companies was not considered by Congress. 49 U.S.C. § 14501(c)(2)(C) specifically and unequivocally refers to "Tow Trucks" and the legislative history discusses local government concerns over tow trucks. Regardless of other, even paramount concerns, over air cargo, it is without dispute that at some point the debate included the towing industry.

II.

THE PRESENT CASE IS NOT THE APPROPRIATE VEHICLE TO DETERMINE THE EFFECT OF 49 U.S.C.A. § 13506(b).

The City's position that 49 U.S.C.A. § 13506(b) argues against preemption of non consensual towing is not a well developed issue in the present case. 49 U.S.C.A. § 13506(b) provides an argument that without certain findings by the Secretary of Transportation or the Surface Transportation Board neither the Secretary or the Board should extend federal jurisdiction into the regulation of "transportation provided entirely in a municipality" or into the "emergency towing of an accidentally wrecked or disabled motor vehicle."

Petitioners and Respondents agree that the factual basis for the present case does not involve either "transportation

provided entirely in a municipality" or the "emergency towing of an accidentally wrecked or disabled motor vehicle." The record in the present case is silent as to the presence or absence of any findings by the Secretary or Board.

As Petitioners point out in footnote 5 on page 19 of their Petition there is currently pending in the United States Court of Appeals for the Fifth Circuit the case of *Cardinal Towing & Auto Repair, Inc. et al. v. The City of Bedford, Texas, et al. Case no.* 98-10194 which was argued February 1, 1999. That case involves the "non-consensual towing of abandoned and wrecked vehicles." That case perhaps has a full record on this issue and would provide an appropriate case in which to decide matters related to 49 U.S.C.A. § 13506(b).

The present case is the only United States Court of Appeals opinion on the preemptive effect of 49 U.S.C. § 14501(c)(2)(C). The record is incomplete at best on issues of non-consensual towing whether the issues be fact or law. The present case is not an appropriate case to determine the issues raised by the Petitioner.

CONCLUSION

For the above and foregoing reasons the Opinion of the Court of Appeals is correct. The Court of Appeals applied the correct principles of statutory construction and reached the correct decision with regard to consensual towing. This case is not the appropriate case to determine the application to non-consensual towing. The case of *Cardinal Towing & Auto Repair, Inc. et al. v. The City of Bedford, Texas, et al. Case no.* which is currently before the United States Court of Appeals for the Fifth Circuit concerns a factual situation of non-consensual towing and would provide a better vehicle for the decisions urged by the Petitioners.

Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

THOMAS E. MADDOX, JR.
Counsel of Record
THOMAS E. MADDOX, JR., P.C.
Attorneys for Respondents
3521 Habersham-at-Northlake
Tucker, Georgia 30084-4009
(770) 414-8055